- **COMPLIANCE BOARD – AUTHORITY AND PROCEDURES -***GENERALLY*
  - ANNOUNCEMENT OF VIOLATION FOUND BY COMPLIANCE BOARD, SUFFICIENT

- **EXCEPTIONS PERMITTING CLOSED SESSIONS –** *LEGAL ADVICE, § 10-508(a)(5) – WITHIN EXCEPTION*
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  - DISCUSSION WITH COUNSEL AND LOBBYISTS REGARDING ADVANCING POSITION ALREADY ADOPTED PUBLICLY

- **MINUTES OF CLOSED SESSION –** *GENERALLY*
  - WRITTEN CLOSING STATEMENT PREPARED BEFORE A CLOSED SESSION NOT A SUBSTITUTE FOR SEALED MINUTES OF THE SESSION

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July 23, 2014

Re: Town Council of the Town of Chevy Chase
Miriam Schoenbaum, Complainant

Miriam Schoenbaum ("Complainant") alleges that the Town Council of the Town of Chevy Chase violated the Open Meetings Act (the "Act") in two ways during the Council's April 9, 2014 meeting. The Town responded and provided us with the relevant meeting documents.

1. *Whether the Council announced the issuance of 9 OMCB Opinions 99 (2014) at the next public meeting.*

Complainant alleges that the Council violated the provision of the Act that requires public bodies to announce violations found by this Board. That provision, State Government Article § 10-502.7(i), provides, in relevant part, as follows:

> If the Board determines that a violation [of the Act] has occurred: . . . at the next open meeting after the Board has issued its opinion, a member of the public body shall announce the violation and orally summarize the opinion . . . .

On March 20, 2014, the Board issued an opinion that contained several determinations that the Council had violated the Act. *See* 9 *OMCB Opinions* 99 (2014).[1] On April 4, the mayor announced the issuance of the opinion on the Town's website. The Council's next open meeting occurred on April 9. The minutes of that meeting do not reflect any oral announcement of the violations. From the minutes, Complainant infers that the violations were not announced at the meeting. In response, the Council informs us that the Mayor did announce the violations at that meeting, and it provided us with the statement she read.

We conclude that the Council complied with § 10-502.7(i). We encourage members of the public to pose their questions first to a member or the staff of the public body, as those individuals can often address a concern faster than we can through the Act's complaint procedures. Likewise, we suggest that public bodies might easily avoid complaints such as these by documenting, in their minutes, their compliance with the requirement.

2. *Whether the Council permissibly met in closed session with the lawyers and consultants it had engaged to advocate its position on a transportation project*

Complainant next alleges that the Council violated the Act by closing the April 9 meeting to discuss matters that did not fall within the statutory provisions, or "exceptions," on which the Council relied as authority for excluding the public. When a public body's meeting is subject to the Act, the public body may meet behind closed doors only to discuss one of the fourteen subjects listed in § 10-508(a). Further, before the public body meets in closed session, its presiding officer must disclose, on a written statement, the exception that authorizes the exclusion of the public, the topics to be discussed, and the public body's reason for excluding the public. § 10-508(d). After the closed session, and in the minutes of its next open session, the public body must provide a summary of what actually occurred in the closed session. § 10-509(c). Public bodies must keep minutes of all meetings, open or closed, subject to the Act; closed-session minutes are to be "sealed and not open to public inspection." § 10-509(b),

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The Council later reported on the events of the closed session in the summary that it included in its minutes of the April 9 open session. The Council apparently did not keep separate minutes of the closed session; its attorney has advised our staff that the Council adopted the summary as those minutes. The summary states that the meeting was closed under "§ 10-508(a)(7) to consult with counsel to obtain legal advice on matters related to the proposed Purple Line project and matters related to Maryland Public Information Act requests; and pursuant to . . . § 10-508(a)(8) to consult with staff, consultants, or other individuals about potential litigation related to the proposed Purple Line project." The Council disclosed the presence of the Town Attorney and the participation, by telephone, of "Terrence Heubert of the law firm of Buchanan, Ingersoll & Clooney PC; Matt Ginsberg of the law firm of Chambers, Conlon & Hartwell; and Robert Garagiola of the law firm of Alexander & Cleaver."

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Complainant questions whether the "potential litigation" and "legal advice" exceptions extend to the Council's discussions with members of a firm that "would not be providing legal advice to the Chevy Chase Town Council." Specifically, she alleges that if the Council "discussed lobbying or any other topic with Buchanan and/or its two subcontractors during the closed session on April 9, except as provided in SG § 10-508(a), then [the Council] violated [the Act]." As we will explain, we conclude that the subjects that the Council disclosed as the topics of its April 9 closed meeting fell within these two exceptions.

The "potential litigation" exception allows a public body to discuss a particular matter with its "staff, consultants, or other individuals," whether or not the public body's own lawyer is present. In any event, the Town Attorney was there. While we have not had the occasion to opine broadly on whether the exception extends to consultations with lobbyists about potential litigation, we have construed the exception to include discussions about alternatives to litigation in a particular matter. *See, e.g.*, 1 *OMCB Opinions* 56, 60 (1994). The "legal advice" exception, we have concluded, requires the giving of legal advice by a lawyer, but it does not preclude the presence of people assisting the lawyer with an understanding of the issues. *See, e.g.*, 1 *OMCB Opinions* 1, 5 (1992); 8 *OMCB Opinions* 161, 163-64 (2013).

Here, from the information provided to us, it appears that the Council met with lawyers to receive legal advice on two statutes and met with lawyers and government relations consultants to discuss potential litigation regarding the Purple Line. Those discussions fell within the exceptions claimed. Had the meeting been attended only by the Council and non-lawyer "government relations professionals," and had the Council claimed only the "legal advice" exception, our conclusion would have been different. And, had the Council members used the meeting with the Town's lawyers and consultants to decide what position the Council should take with regard to the Purple Line, such a policy discussion would likely have exceeded the bounds of both exceptions. *See, e.g.*, 6 *OMCB Opinions* 145, 149 (1995) (city council exceeded the scope of the legal advice exception when, during the closed session in which it heard the city attorney's advice on regulating the use of the city's boardwalk, it asked him to draft an ordinance). Here, however, the Council had evidently formulated its position on the Purple Line well before the April 9 meeting; the March 20 opinion that the Compliance Board issued on an earlier complaint involved the Council's interviews of outside lawyers to advocate

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We add an observation about the Council's documentation of this meeting. The adoption of a closed-session summary as the minutes of a closed session can be problematic, and it was problematic here. The two forms of documentation serve different purposes and in most cases are not interchangeable. A closed-session summary is designed to be public, and it therefore contains only the information about a closed session that the public body deems non-confidential. It serves as the public's way of determining whether the topics that the public body actually discussed matched the topics that the public body said that it would discuss in closed session. From the summary, the public should also be able to broadly ascertain whether the actual discussion fell within the exceptions that the public body claimed as a basis for excluding the public. By contrast, true minutes of a closed session are by design confidential—under the Act, they are "sealed" and available to us only on the condition that we keep them confidential—and ideally reflect the topics discussed in some detail. Sealed minutes serve not just as a means by which the public body may keep a confidential record of the session, but also, and, more importantly here, as the primary means by which we can determine the legality of a closed meeting. *See, e.g.*, 8 *OMCB Opinions* 176, 178 (2013) (explaining the function of closed-session minutes). Sealed minutes therefore should specify the confidential matter in enough detail for us to determine compliance. That the Council's summary did not suffice as closed-session minutes is suggested by the Council's elaboration, only in its response, that it had discussed Endangered Species Act issues with its counsel.

Conclusion

From the information available to us, we conclude that the Council did not violate the Act in either of the ways alleged. We encourage the Council to document its closed sessions in sealed minutes.

Open Meetings Compliance Board

Monica J. Johnson, Esquire
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Conclusion

From the information available to us, we conclude that the Council did not violate the Act in either of the ways alleged. We encourage the Council to document its closed sessions in sealed minutes.

Open Meetings Compliance Board

Monica J. Johnson, Esquire
Wanda Martinez, Esquire

- **COMPLIANCE BOARD – AUTHORITY AND PROCEDURES -***GENERALLY*
  - ANNOUNCEMENT OF VIOLATION FOUND BY COMPLIANCE BOARD, SUFFICIENT

- **EXCEPTIONS PERMITTING CLOSED SESSIONS –** *LEGAL ADVICE, § 10-508(a)(5) – WITHIN EXCEPTION*
  - DISCUSSION WITH TOWN ATTORNEY

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  - DISCUSSION WITH COUNSEL AND LOBBYISTS REGARDING ADVANCING POSITION ALREADY ADOPTED PUBLICLY

- **MINUTES OF CLOSED SESSION –** *GENERALLY*
  - WRITTEN CLOSING STATEMENT PREPARED BEFORE A CLOSED SESSION NOT A SUBSTITUTE FOR SEALED MINUTES OF THE SESSION

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July 23, 2014

Re: Town Council of the Town of Chevy Chase
Miriam Schoenbaum, Complainant

Miriam Schoenbaum ("Complainant") alleges that the Town Council of the Town of Chevy Chase violated the Open Meetings Act (the "Act") in two ways during the Council's April 9, 2014 meeting. The Town responded and provided us with the relevant meeting documents.

1. *Whether the Council announced the issuance of 9 OMCB Opinions 99 (2014) at the next public meeting.*

Complainant alleges that the Council violated the provision of the Act that requires public bodies to announce violations found by this Board. That provision, State Government Article § 10-502.7(i), provides, in relevant part, as follows:

> If the Board determines that a violation [of the Act] has occurred: . . . at the next open meeting after the Board has issued its opinion, a member of the public body shall announce the violation and orally summarize the opinion . . . .

On March 20, 2014, the Board issued an opinion that contained several determinations that the Council had violated the Act. *See* 9 *OMCB Opinions* 99 (2014).[1] On April 4, the mayor announced the issuance of the opinion on the Town's website. The Council's next open meeting occurred on April 9. The minutes of that meeting do not reflect any oral announcement of the violations. From the minutes, Complainant infers that the violations were not announced at the meeting. In response, the Council informs us that the Mayor did announce the violations at that meeting, and it provided us with the statement she read.

We conclude that the Council complied with § 10-502.7(i). We encourage members of the public to pose their questions first to a member or the staff of the public body, as those individuals can often address a concern faster than we can through the Act's complaint procedures. Likewise, we suggest that public bodies might easily avoid complaints such as these by documenting, in their minutes, their compliance with the requirement.

2. *Whether the Council permissibly met in closed session with the lawyers and consultants it had engaged to advocate its position on a transportation project*

Complainant next alleges that the Council violated the Act by closing the April 9 meeting to discuss matters that did not fall within the statutory provisions, or "exceptions," on which the Council relied as authority for excluding the public. When a public body's meeting is subject to the Act, the public body may meet behind closed doors only to discuss one of the fourteen subjects listed in § 10-508(a). Further, before the public body meets in closed session, its presiding officer must disclose, on a written statement, the exception that authorizes the exclusion of the public, the topics to be discussed, and the public body's reason for excluding the public. § 10-508(d). After the closed session, and in the minutes of its next open session, the public body must provide a summary of what actually occurred in the closed session. § 10-509(c). Public bodies must keep minutes of all meetings, open or closed, subject to the Act; closed-session minutes are to be "sealed and not open to public inspection." § 10-509(b),

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(c). Nonetheless, sealed minutes are to be available for our inspection in connection with a complaint under the Act. § 10-502.5(c)(2).

As relevant here, the Council prepared a written statement that disclosed that the Council would close the April 9 meeting under two exceptions: the one in § 10-508(a)(7) for "consult[ing] with counsel to obtain legal advice" and the one in § 10-508(a)(8) for "consult[ing] with staff, consultants, or other individuals about pending or potential litigation." For the § 10-508(a)(7) "legal advice" exception, the Council disclosed that it would discuss Public Information Act "requests from ACT and legal advice related thereto." For the § 10-508(a)(8) "potential litigation" exception, the Council disclosed that it would discuss "Purple Line potential litigation, and legal advice related thereto." The Council stated that it was closing the meeting "[t]o preserve the confidentiality of the discussions."

The Council later reported on the events of the closed session in the summary that it included in its minutes of the April 9 open session. The Council apparently did not keep separate minutes of the closed session; its attorney has advised our staff that the Council adopted the summary as those minutes. The summary states that the meeting was closed under "§ 10-508(a)(7) to consult with counsel to obtain legal advice on matters related to the proposed Purple Line project and matters related to Maryland Public Information Act requests; and pursuant to . . . § 10-508(a)(8) to consult with staff, consultants, or other individuals about potential litigation related to the proposed Purple Line project." The Council disclosed the presence of the Town Attorney and the participation, by telephone, of "Terrence Heubert of the law firm of Buchanan, Ingersoll & Clooney PC; Matt Ginsberg of the law firm of Chambers, Conlon & Hartwell; and Robert Garagiola of the law firm of Alexander & Cleaver."

Not all of the "law firms" identified in the summary are law firms; not every person listed as being "of" those firms is a lawyer. Buchanan, Ingersoll & Clooney's website describes the firm as a "law firm" and refers to its "lawyers and government relations professionals." Mr. Heubert is listed there as a "government relations professional" and is not a lawyer. Chambers, Conlon & Hartwell describes itself as a "government relations firm"; it is not a law firm, and Mr. Ginsberg is not a lawyer. Alexander & Cleaver is a law firm; Mr. Garagiola is a lawyer. As for the relationships among these firms and the Town, the Town contracted with Buchanan, Ingersoll & Clooney ("Buchanan"). In the contract that Complainant provided to us, Buchanan undertook to "provide Government Relations services to the Town with respect to strategy development and implementation of the Town Government Relations initiatives." The contract lists the other two firms as its "subcontractors." It thus appears that the Council met with its lawyer, its lobbyist, and a lawyer and a lobbyist who were "subcontractors." As to the content of the discussions

in the closed session, the Council, in its response, adds the information that the Council "received legal advice on the Endangered Species Act as it relates to the Purple Line" as well as on the Maryland Public Information Act.

Complainant questions whether the "potential litigation" and "legal advice" exceptions extend to the Council's discussions with members of a firm that "would not be providing legal advice to the Chevy Chase Town Council." Specifically, she alleges that if the Council "discussed lobbying or any other topic with Buchanan and/or its two subcontractors during the closed session on April 9, except as provided in SG § 10-508(a), then [the Council] violated [the Act]." As we will explain, we conclude that the subjects that the Council disclosed as the topics of its April 9 closed meeting fell within these two exceptions.

The "potential litigation" exception allows a public body to discuss a particular matter with its "staff, consultants, or other individuals," whether or not the public body's own lawyer is present. In any event, the Town Attorney was there. While we have not had the occasion to opine broadly on whether the exception extends to consultations with lobbyists about potential litigation, we have construed the exception to include discussions about alternatives to litigation in a particular matter. *See, e.g.*, 1 *OMCB Opinions* 56, 60 (1994). The "legal advice" exception, we have concluded, requires the giving of legal advice by a lawyer, but it does not preclude the presence of people assisting the lawyer with an understanding of the issues. *See, e.g.*, 1 *OMCB Opinions* 1, 5 (1992); 8 *OMCB Opinions* 161, 163-64 (2013).

Here, from the information provided to us, it appears that the Council met with lawyers to receive legal advice on two statutes and met with lawyers and government relations consultants to discuss potential litigation regarding the Purple Line. Those discussions fell within the exceptions claimed. Had the meeting been attended only by the Council and non-lawyer "government relations professionals," and had the Council claimed only the "legal advice" exception, our conclusion would have been different. And, had the Council members used the meeting with the Town's lawyers and consultants to decide what position the Council should take with regard to the Purple Line, such a policy discussion would likely have exceeded the bounds of both exceptions. *See, e.g.*, 6 *OMCB Opinions* 145, 149 (1995) (city council exceeded the scope of the legal advice exception when, during the closed session in which it heard the city attorney's advice on regulating the use of the city's boardwalk, it asked him to draft an ordinance). Here, however, the Council had evidently formulated its position on the Purple Line well before the April 9 meeting; the March 20 opinion that the Compliance Board issued on an earlier complaint involved the Council's interviews of outside lawyers to advocate

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